late one of the judges of the Queen's Bench, in a letter to the author, declared so remarkable.

The "*homo unius libri*" is proverbially a dangerous antagonist, and so in another sense he may prove a most valuable friend and ally. One test to which the writer has put Mr. Robinson's work has been on the suggestion of any difficulty to apply to his pages for the solution, and almost invariably the work has answered his appeal, either by solving the difficulty or showing him that the question is yet an open one among the learned, and introducing him to all that is important which has been said on the subject.

To the advanced student, and to the man actively engaged in the administration of the law, this work of Mr. Robinson's seems alike invaluable; a copy of it in many country towns, where well-selected libraries are rare, would be invaluable. It is to be hoped the learned author may live to complete that which has evidently been with him a labor of love. However that may be, in what has been accomplished, the author has already paid handsomely the debt which every lawyer is said to owe to his profession. To that profession we cordially recommend the book.

P. P. M.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

JOHN W. KIMBROUGH, APPELLANT, *v.* GEORGE LANE ET AL., APPELLEES.

A contract having for its consideration an agreement to suppress a criminal prosecution is void.

It is equally so, if any part of the consideration was the suppression of the prosecution, and whether the contract was induced by promises or threats on one side or the other.

It is not necessary that the promise should be made at the same time as the contract; it is sufficient if it was made prior thereto, and was acted upon as a part of the consideration or inducement.

Nor does it make any difference that a prosecution is already commenced and is in the hands and under the control of the Commonwealth's officer, if the private prosecutor, as consideration for the contract, promises to abandon his own efforts in the course of justice. The particular interest of the party injured, in bringing the offender to justice, is one of the securities of the public in the enforcement of the laws, and any agreement by which this interest is turned against the Commonwealth is void.

THIS was a suit in equity, brought by appellant in the Bath Circuit Court, against the appellees, George Lane and T. C. Owings,

on a note for $3000, executed by them to him September 18th 1872, which recites that it was given in consideration of a note due by Lane & Brothers to the appellant for $8600, from which they had been discharged in bankruptcy.

He also sought to foreclose a mortgage upon sixty-seven and a half acres of land, given by Owings to secure the payment of the note, and J. A. J. Lee having purchased the land, was made a defendant.

The defendants answered in substance that George Lane, for himself and brothers, purchased and received of the plaintiff a number of mules, for which a note was executed to and accepted by him; that afterward the plaintiff came to the said George and expressed some uneasiness as to the sufficiency of the note, and prevailed on the said George to execute to him a mortgage on a tract of land to secure the debt; that about March 1872, the plaintiff was foreman of the grand jury of Harrison county, and induced said grand jury to find and present an indictment against said George for obtaining the mules by false pretences; that he was arrested, and while in attendance at the Harrison Circuit Court for trial on said charge, "the plaintiff proposed and agreed to and with said George that if he would pay or secure to him $3000 he would have the criminal prosecution aforesaid dismissed, and that he would not appear as a witness against him. He and his wife were the prosecuting witnesses, and the defendants say in consideration that the plaintiff would procure the dismissal of said prosecution, the bond sued on was executed, and the plaintiff did thereupon, in consideration thereof, abandon the prosecution and procured its dismissal. The mortgage was executed by defendant Owings at the same time and for no other consideration."

The cause subsequently came into the Bath County Court of Common Pleas, where a trial was had, which resulted in a judgment dismissing the petition, and this appeal is prosecuted to reverse that judgment.

A. Duval, Nesbitt & Gudgell and *Wm. H. Holt*, for appellant.

Apperson & Reid and *Reid & Stone*, for appellees.

The opinion of the court was delivered by

COFER, J.—It is an old and well-settled rule of the common law that contracts having for their consideration an agreement to stifle

a criminal prosecution are void, because they are against the policy of the law, which will not permit an injury to the public to be made the subject of private agreements whereby the redress of the public wrong may be hindered or defeated. And it is equally well settled that if any part, however small, of the entire consideration of a contract be vicious, the whole contract is void.

Every citizen is under an obligation to the public to abstain from voluntarily placing himself in a position in which it is to his pecuniary interest to suppress, stifle or impede a public prosecution. "The Commonwealth has a right to rely upon the individual who has received special injury from the commission of a public offence, as the special instrument for its ascertainment and punishment in the due course of law."

"The particular interest which he may be supposed to feel in bringing the offender to justice is one of the securities on which the public relies, and has a right to rely, for the enforcement of the laws and its own safety, and an agreement by which this interest is turned against the Commonwealth is in violation of her rights and policy:" *Gardner* v. *Maxey*, 9 B. Mon. 90; *Swan, &c.*, v. *Chandler & Phillips*, 8 Id 98.

That such is the law was conceded in the argument, but it was insisted that the evidence did not show that such an agreement as that set forth in the answer was made. George Lane and Owings both testified directly and positively that an agreement in substance the same as that set forth in the answer was made. This, however, is contradicted by the appellant and two other persons present at the time the agreement to execute the note and mortgage was finally entered into, who say that the appellant then distinctly said that he could not make any arrangement with Lane by which he would agree to have the indictment dismissed, or fail to appear as a witness against him; that the case was in the hands of the Commonwealth, and would have to be disposed of by the court; that he could in no way control the prosecution, and would not undertake to do so.

The appellant swore that he did not speak to the Commonwealth's attorney on the subject of dismissing the indictment, and the attorney swore that he dismissed it because, after talking with the witnesses, he was satisfied he could not make out a case. If this was all the evidence in the record upon the subject, we should incline to the opinion that the agreement set forth in the answer

was not established by the evidence; but there are other important facts which, although they do not prove that there was an express agreement made at the time the note and mortgage were given, prove that appellant and Lane and Owings then understood that the prosecution would be abandoned if the sum of $3000 was secured to the appellant, and that the execution of these securities was the condition on which he would not only refrain from a vigorous prosecution through counsel employed by him for that purpose, but would abandon all efforts to bring Lane to trial.

The prosecution was called September 16th 1872, and set for trial on the 18th of that month, and attachments were awarded against absent witnesses for the Commonwealth. On the 18th, after the case was called for trial, the appellant and his counsel employed to aid in the prosecution, retired with Lane and Owings, and one of the Commonwealth's witnesses, to a consulting-room in the court-house, and there, while the question of proceeding with the trial was before the court, and when, for aught that appears, the Commonwealth was ready to proceed with the trial, the appellant entered into, or rather renewed, negotiations with Lane for securing a part of his debt, from which, according to the recital in the note then given, Lane had been discharged in bankruptcy. Owings proved, without contradiction by any one, that during this interview the appellant desired him (Owings) to mortgage his land to secure the sum of $3000; that he was unwilling to do so, but offered to give him personal security, which he refused to accept; that the appellant then rose from his seat and said that "that was the last damned proposition he intended to make; that he had Bath county money to prosecute George Lane with;" and thereupon Owings agreed to execute the mortgage, and did so.

Appellant agreed, if this was done, to discharge the attorney he had employed to aid in the prosecution, and immediately did so; and he also promised that if Lane was brought to trial on the indictment he would surrender the note and mortgage.

Some of the Commonwealth's witnesses, against whom attachments were awarded on the 16th, and who were present on the 18th, returned home that day, and no further action seems to have been taken in the case until September 24th 1874, when, on motion of the attorney for the Commonwealth, the indictment was dismissed.

Owings's deposition was taken in December 1873, and he proved

that prior to the execution of the note and mortgage, the appellant said to Lane that, for $2500 in cash, or $3000 on time, he would dismiss the prosecution.

This proposition, he says, was not made in his presence, but Lane and appellant were in a room together and sent for him, and appellant then told him what proposition he had made. The appellant gave his deposition in March 1874, but failed to contradict Owings's statement. After the date of the note and mortgage, and before the indictment was dismissed, appellant wrote to Lane as follows:—

"I think I am fully satisfied that you are co-operating with parties to put me to some trouble to secure the money on the note I hold against you. All I have to say to you is this: I was taken out by several persons the day I was in Owingsville, and an effort made to get from me something to commit you in your county. I evaded all questions. You know what I promised you, but that promise depends upon your action in this matter. If anything is gotten hold of against you in Bath county you will find things hotter than you have any idea of at this time. Everything depends upon, not what you can do to refute, but to advance this matter to a final settlement."

These facts leave no room to doubt that, at the time the note and mortgage were given, it was understood by all parties present that the prosecution would end, so far as appellant was concerned, as soon as the required security was given, and it is equally clear that it was likewise understood that, unless they were given, the case would go on as far as it was in his power to carry it on.

Why declare that he had made his last proposition, and that he had money to carry on the prosecution, if he did not mean to be understood as intending to carry it on, if his demand was not acceded to, and to abandon it if his debt was secured?

If he had made no promise, express or implied, to abandon the prosecution, to what promise did he refer in his letter? If the further prosecution was not to be abandoned, why not proceed with it in September 1872, when, as far as appears, the Commonwealth was ready to go on with it?

Considerable stress is laid by his counsel upon the declaration proved to have been made by the appellant at the interview, which resulted in the execution of the note and mortgage, that he could not make any arrangement by which he would undertake to have

the indictment dismissed, and that he would not fail or refuse to testify if called for that purpose; that the case was in the hands of the Commonwealth, and would have to be disposed of by the court.

If this evidence stood alone in the record it might be entitled to some consideration, but when viewed in connection with his former offer to dismiss the indictment for $2500 in cash, or $3000 on time, and his declaration at the time when the negotiation was closed that he had made his last proposition, and had money to prosecute Lane with, his agreement to surrender the note and mortgage if the prosecution went on; the fact that from that moment it seems to have been wholly abandoned, and the reference in his letter to Lane to the promise he had made, and his covert threat, if Lane did not keep the promise made by him, we do not regard the declaration that he did not intend to bind himself to interfere between Lane and the Commonwealth as furnishing any evidence whatever that he did not make the promise imputed to him in the answer.

It is not necessary that the promise should have been made at the very moment, or even on the same day, of the execution of the writings; it is enough if it appears that such a promise was made at that time or prior thereto, and that all parties acted in view of that promise, or that it was the inducement which operated upon the minds of the obligors.

The appellant was the person alleged to have been injured by the act for which Lane was indicted, and the public had a right to rely upon the interest which he would naturally feel in having him brought to punishment in due course of law, and has a right to complain of a contract, the direct natural effect of which was to turn that interest against the Commonwealth. Such contracts are highly reprehensible when made by one having no other relation to a prosecution than that of being the person injured by the public offence, but when, in addition to being the party specially aggrieved, he is also connected with the origin of the prosecution by having been a member of the grand jury by which the indictment was found, the courts should scan the transaction with jealous vigilance in order to avoid being made the instruments of oppression in the hands of those who, for vengeance or profit, may seek through public prosecution to extort money to which they are not legally entitled, or for the recovery of which civil process affords them no

remedy, and for the further purpose of guarding the instrumentalities provided by law for the detection and punishment of crime from corruption.

No citizen can be put upon trial for an infamous crime, except upon the indictment of a grand jury. This has been thought so valuable a safeguard to individuals as to deserve a place in the Bill of Rights in our Constitution. But it will prove a snare instead of a protection if a member of a grand jury, conceiving himself to have been the victim of a felony, may, by his own testimony, and, if need be, his own vote and personal influence with his fellow grand jurors, procure an indictment against the supposed criminal, and then by threats of a vigorous prosecution if his private grievance is not redressed, and promises express or implied that he will forbear if they are complied with, obtain an enforcible contract for his own indemnity.

Where a person injured by a criminal act was himself a member of the grand jury by which the alleged offender was indicted, and the aggrieved person enters into negotiations with the accused for his own indemnity for losses resulting from the criminal act, and the prosecution is suddenly abandoned, especially after threats that it will be carried on vigorously unless indemnity be made, it will require but slight evidence to satisfy the court, not only that there was an agreement to compound the offence, but that the prosecution was set on foot to bring the accused and his friends to terms.

It is urged by some of appellant's counsel that as Lee purchased the land mortgaged by Owings, subject to the mortgage, and he will be so much the gainer if the appellant fails in his efforts to foreclose, while Owings and Lane will gain nothing, this ought to have some weight with the court in deciding the question.

It is sufficient to say on this point that the rule of law inhibiting such contracts was not made for the benefit of the obligors in the illegal contract. They stand in no better position in the eyes of the law than the obligees.

The courts will not enforce such contracts, because they are levelled at the safety and repose of society, and are calculated to shield the guilty from punishment and leave them free to prey upon the public. If money is paid upon such a contract, the courts will not aid in recovering it back; they will leave both parties in the exact position in which they have placed themselves. Though we differ somewhat from the learned judge below in our

conclusion from the facts, his judgment is right and must be affirmed.

The foregoing opinion discusses a question of great practical importance, in regard to which we fear the law of this country is by no means up to the standard of the English common law, either in principle or administration. The rule in the English courts is very extensively discussed in *Wells* v. *Abrahams*, Law Rep. 7 Q. B. 554, in regard to the right of any civil remedy, and what remedy, the party aggrieved by a felonious act, which also involves an infraction of private right, may demand in a court of justice.

It seems to have been intimated in some of the early English cases, that the civil remedy, or right of action, is merged in the felony: *Higgins* v. *Butcher*, Yelv. 89; *Dawkes* v. *Covenei'gh*, Styles 346; BULLER, J., in *Masters* v. *Miller*, 4 Term Rep. 320-332; *Crosby* v. *Long*, 12 East 409. In the latter case it was held only to be suspended till the defendant was convicted or acquitted of the criminal charge without connivance. But later cases treat the civil right of action as merely suspended until the offender shall be convicted: *Wellock* v. *Constantine*, 2 Hurlst. & Colt. 146; *Gimson* v. *Woodfall*, 2 C. & P. 41; *White* v. *Spettigue*, 13 M. & W. 603. And the rule does not apply to one who waived the right innocently.

In the case of *Wells* v. *Abrahams*, *supra*, it is agreed by all the judges, that, although the felon cannot plead his own crime either in bar or suspension of the civil remedy, as held in *Luttrell* v. *Reynell*, 1 Mod. 282, yet that if the felony appear either upon the declaration or evidence, it is competent in some proper mode to stay proceedings in the civil action, until the felon shall be convicted. Some of the cases go the length of holding that in such case it is the duty of the court to interfere *sua sponte* and stay the civil action: *Gimson* v. *Woodfall*, *supra*; *Wellock* v. *Constantine*, *supra*. But this doctrine has been repudiated: *White* v. *Spettigue*, *supra*; *Wells* v. *Abrahams*, *supra*. But the latter case distinctly recognises the rule of law that the civil remedy is suspended during the prosecution for felony and cannot be pressed until that has been terminated either by conviction or acquittal without plaintiff's connivance: *Crosby* v. *Long*, *supra*.

But we are not aware that this rule has ever been enforced to any great extent, if at all, in this country: Metcalf's note 2 to *Higgins* v. *Butcher*, Yelv. 89. But the rule of the common law, that all contracts for compounding or stifling prosecutions for felony are illegal and void, is maintained here to the fullest extent. The compounding of felony or stifling prosecutions therefor, is also indictable as a misdemeanor in most of the American states, either by special statute or by force of common law. It has often been intimated in English cases that this rule did not extend to mere misdemeanors, and that parties interested in such prosecutions might lawfully compound them: *Elworthy* v. *Bird*, 9 Moore 230; 2 Bing. 258; *Drage* v. *Ibbetsons*, 2 Esp. 643; ELLENBOROUGH, Ch. J., in *Taylor* v. *Lendey*, 9 East 49. But this rule is confined, we believe, to prosecutions for offences where the party aggrieved is principally concerned, and where the compromise is effected under the advice of the court, by virtue of the English statute 18 Eliz., c. 5, s. 3. For in *Collins* v. *Blantern*, 2 Wilson 341, 1 Smith's L. C. 489, the question how far the contract for stifling or compounding a prosecution for perjury, which is only a misdemeanor in England, and securities given in furtherance of such compromise, may be enforced in the courts, was greatly dis-

cussed, and it was clearly held, that no action can be maintained upon any such contract where any part of the consideration arises from such compromise, thus making no distinction between felony and other offences of similar enormity.

We have examined the facts upon which the court deny the validity of the contract in the principal case, and it seems to us the decision is based upon most satisfactory grounds; for the contract seems to have had no other consideration but the compromise or abandonment of the prosecution against the defendant, and was expressly agreed to be surrendered if the defendant were brought to trial. There would seem, then, to be no ground to argue that the contract did not rest exclusively upon the abandonment of the criminal prosecution, which, though not for a felony, was an offence of the same public character and of great moral turpitude.

I. F. R.

Superior Court of New Hampshire.

PERRY ET AL. v. CITY OF KEENE.

The laying of taxes is a legislative function, and the policy and expediency of it, as well as its amount, are questions exclusively for that department of the state.

There is no abstract legal principle by which to determine whether a use is public; a court must decide it as a conclusion of fact and public policy, in the same manner as the legislature. Hence, while it is clearly the duty of a court to determine finally what is a public purpose, it will only decide adversely to the judgment of the legislature in a clear case.

If a purpose is public, it makes no difference that the agent by whom it is to be carried out is a private individual or corporation.

The building of a railroad is a public purpose; and a statute authorizing a town to vote money to aid in such purpose, even though the money is to be given as a *gratuity* and not as a subscription to stock, is not unconstitutional as a taking of private property for a private use.

THIS was a bill in equity, by certain tax-payers in Keene, praying for an injunction to restrain the defendants from issuing bonds, &c., in aid of the construction of the Manchester and Keene Railroad, in pursuance of a vote of the city councils to that end. The facts are stated in the opinion.

Sargent & Chase and *Hardy*, for the plaintiffs.

Lane, *Faulkner* and *Burns*, for the defendants.

LADD, J.—"Any town may, by a two-thirds vote, raise, by tax or loan, such sums of money as they shall deem expedient, not exceeding five per cent. of the valuation thereof, * * * and appropriate the same to aid in the construction of any railroad in this state, in such manner as they shall deem proper:" Gen. Stats.,